

30(b)(6) NPBL by C. Moss - February 14, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

CSX TRANSPORTATION, INC.,)
Individually and on behalf)
of NORFOLK & PORTSMOUTH)
BELT LINE RAILROAD)
COMPANY,)
)
Plaintiff,)
)
v.) NO. 2:18cv530
)
NORFOLK SOUTHERN RAILWAY)
COMPANY, NORFOLK &)
PORTSMOUTH BELT LINE)
RAILROAD COMPANY, JERRY)
HALL, THOMAS HURLBUT,)
PHILIP MERILLI and CANNON)
MOSS,)
)
Defendants.)

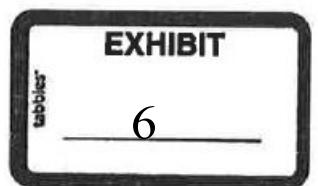
30(b)(6) DEPOSITION UPON ORAL EXAMINATION OF

NPBL by its designee CANNON MOSS

TAKEN ON BEHALF OF THE PLAINTIFF

Norfolk, Virginia

February 14, 2020



1 We have a union work force, so they
2 are -- they don't have a set 40-hour week working nine
3 to five.

4 Q But they are -- they may be unionized,
5 but they are still the Belt Line's employees; correct?

6 A Correct.

7 Q In other words, you are not bringing in
8 people from Local 489 --

9 A No.

10 Q -- but they are on a 1099 or similar
11 basis, okay.

12 And so what is the business of the
13 Belt Line?

14 A Our business is to be the first and last
15 mile in this area, meaning we get traffic from
16 Norfolk Southern and CSX and we provide switching
17 services to the 26 customers that we have up and down
18 the line.

19 Q You said 26 customers.

20 Is that a number that is fixed by any
21 type of agreement, statute or regulation?

22 A No.

23 And we used to have significantly more,
24 but they built a highway system, so we lost a couple.

25 Q Would the Belt Line -- well, is it one of

1 A Like a transformer on a flat car.

2 Q Okay. Any other occasions you can think
3 of when the Belt Line has actually taken CSS -- CSX
4 cars into NIT?

5 A The occasions when we do the dimensional
6 traffic.

7 Q Right.

8 But is there any other thing that you can
9 think of which --

10 A No.

11 Q Okay. In 2015 when the trains -- when
12 CSX trains were being moved directly into NIT by NPBL,
13 whose locomotives were used?

14 A Our locomotives.

15 Q Did the Belt Line keep a separate record
16 of the cars and containers that went directly into NIT
17 in 2015 during that --

18 A I don't believe so.

19 Q Do you recall any problems arising in
20 2015 with the transport of the CSX trains directly into
21 NIT?

22 A Problems from who, NS or CSX?

23 Q For the Belt Line.

24 A I mean, yeah, we had some challenges. It
25 was the first time we had done it.

1 A It's not a train.

2 Q Okay. So then you would be going into
3 Norfolk Southern's Portlock yard with a long train
4 coming from NIT -- or a long car? Is that the --

5 A Yeah, if you had a car longer than
6 73 feet coming from NIT, you would have to go into
7 Portlock yard.

8 Q Okay.

9 (7/31/15 letter of Randall W. Hunt,
10 NPBL005634 marked as NPBL Exhibit Number
11 21)

12 BY MR. McFARLAND:

13 Q Do you recognize the letter that we've
14 marked as Belt Line Deposition Exhibit 21?

15 A Yes.

16 Q Okay. And what did you understand as the
17 recipient of this letter it to be -- to be conveying to
18 you by Norfolk Southern?

19 A It was a year's heads up that our 1917
20 99-year trackage rights agreement was coming to an end.

21 Q And what, if any, action did that cause
22 you to take upon your receipt of this letter?

23 A We began discussing with Norfolk Southern
24 a -- a new trackage rights agreement.

25 Q And, actually, there's two trackage

1 rights agreements at issue; right?

2 A Well, there's the -- yes.

3 Q There's a 1917 and then there's the one
4 that we were looking at previously.

5 A Correct, the interchange agreement.

6 Q Right.

7 A The 1985 interchange agreement.

8 Q Right.

9 And so after July 31st of 2015, I take it
10 there were negotiations between NS and the Belt Line?

11 A Yes.

12 Q Okay. And what was the result of those
13 negotiations, if anything?

14 A I mean, we've -- we've negotiated all
15 parts of the trackage rights except for the rate per
16 car that NS wants to charge us.

17 Q And where does that stand, rate per car?

18 A Norfolk Southern has taken us in front of
19 the Service Transportation Board to mediate the rate.

20 Q And what is the rate that
21 Norfolk Southern wants to charge?

22 A Seventy dollars a car.

23 Q And what is the rate that the Belt Line
24 thinks is the appropriate rate?

25 A Thirty dollars a car.

1 Q And I take it it's pending with the STB
2 right now?

3 A Correct.

4 Q Is there any expected resolution date?

5 A From what I understand, the STB has
6 punted to this lawsuit.

7 Q Okay. How did NPBL arrive at the, I
8 think you said \$30 a car rate?

9 A Sure.

10 We looked at what we were paying
11 historically on a per car basis running up there and
12 then reduced that by a couple dollars and presented
13 \$30.

14 Q Okay. And why did you reduce it by a
15 couple dollars?

16 A You got to start -- why not.

17 Q Okay.

18 A Why offer to pay more money.

19 Q Sure. I am just asking. Okay, fair
20 enough.

21 And -- but was the -- putting aside that
22 you -- well, what had you been paying under the old
23 agreements?

24 A There's several joint facility agreements
25 that make up what we pay Norfolk Southern to run on

30(b)(6) NPBL by C. Moss - February 14, 2020

177

1 | that line.

2 So what's -- which one specifically are
3 you asking me about?

4 Q Well, it sounds like, I mean, we've got
5 it down to at least going forward it's Norfolk Southern
6 wants \$70 a car and you're offering \$30 a car; right?

7 A Correct.

8 Q Okay. So what had you been paying
9 before? What was the 30 -- what was before the \$30
10 that you're now offering? Was it, I don't know, 50?

11 A Sure.

13 A With the 1917 agreement, we were
14 basically paying \$8 a car, but we had fixed costs built
15 into that agreement among some other joint facilities
16 agreements which are about a hundred thousand dollars
17 worth of fixed costs that would then get spread across
18 all the cars that we ran up there.

19 Q Okay. So what did -- what did, under the
20 old agreements, what did the per car cost come to for
21 NPBL? What were you, in a sense, paying NS?

22 MR. CHAPMAN: Object to the form.

23 THE WITNESS: Which year?

24 BY MR. MCFARLAND:

Well, let's use 2014.

1 railroad, we're more than happy to work with them and
2 develop -- help them develop a facility.

3 (3/23/18 letter of Tony DiDeo,

4 CSXT0101884-89 marked as NPBL Exhibit
5 Number 31)

6 BY MR. McFARLAND:

7 Q Are you familiar with what we've marked
8 as Belt Line Exhibit Number 31?

9 A Yes.

10 Q Okay. Did you receive this letter from
11 Mr. DiDeo back in March of 2018?

12 A Yes.

13 Q Okay. And after receipt of this letter,
14 what, if any, actions did you take as to it?

15 A We discussed it internally and discussed
16 the opportunity with the port, talked to
17 Norfolk Southern about how we could do it.

18 We, Donna and I, reviewed the rate and
19 we're going to make a recommendation to the board.

20 Q I'm sorry?

21 A And we made -- actually we made a
22 recommendation to the board for a rate committee.

23 Q Okay. So let's take it in part.

24 When it came in, you said you reviewed it
25 internally at the -- at NPBL?

1 A Correct.

2 Q And did you review it with Miss Coleman?

3 A Yes.

4 Q And anyone else?

5 A No, just Miss Coleman.

6 Q Not Mr. --

7 A Probably Mr. O'Brien as well, yes.

8 Q All right. And from the NPBL's
9 management perspective, what were the thoughts on the
10 proposals from CSX?

11 A While we welcomed the opportunity to
12 handle their business, there were some challenges with
13 it in terms of the rate that they had proposed, but if
14 they wanted to send it to us, we would have handled it
15 at our current rate.

16 Q Well, at the current rate. You're saying
17 at the \$210?

18 A Correct.

19 Q But this proposal has a different rate
20 structure; correct?

21 A Correct.

22 Q Okay. Did the Belt Line perform any
23 analysis of the CSX rate structure and what it might
24 mean for the Belt Line in terms of its revenues and
25 profits?

1 A Yes.

2 Q And what was the result of the
3 Belt Line's analysis?

4 A We didn't think that the proposed rate
5 would make sense for us. I mean, it -- there were some
6 problems with the rate they proposed. We didn't know
7 what we were going to be paying Norfolk Southern for
8 trackage rates; we couldn't do an in-depth analysis.

9 The other aspect is if we gave a rate of
10 this magnitude to CSX, then our other largest customer
11 that handled 18,000 carloads would probably want the
12 same one, so we'd lose revenue from that aspect.

13 But that's why we proposed to the board
14 if they want to seriously look at it, to have a rate
15 committee to look at our rates.

16 Q Okay. So is the recommend- -- the
17 official recommendation from management to the board
18 was to have a rate committee look at this proposal?

19 A That's the message I relayed to the
20 board.

21 Q Okay. And what was the board's response
22 to that message?

23 A There was no interest from either side to
24 have a rate committee.

25 Q When you say "either side"...

1 better deal than trucking a container over from PMT to
2 NIT.

3 So with market conditions, we were
4 cheaper.

5 And looking at the overall rate, again,
6 we had so many questions about trackage rights,
7 trackage rights cost, that we couldn't -- in the
8 current state, we were able to look at it and say it
9 didn't add that much revenue but put in the question
10 mark factor of how much per car we were going to end up
11 paying NS. If NS got \$70 a car, it would have
12 definitely not made any sense for this proposal.

13 Q Well, was there any discussion with NS as
14 to what it might charge under this proposal or in light
15 of this proposal?

16 A What do you mean conversation with NS?

17 Q Did you discuss -- after this proposal
18 came in from CSX, were there any discussions by the
19 Belt Line management with NS?

20 A We talked about how operationally it
21 would work out.

22 Q Okay.

23 A I believe I reached out to the joint
24 facilities folks to say can we try to work on the rate,
25 but that's -- that's about it. We didn't talk to

1 came to understand that CSX was trying to make it clear
2 that what the letter was really proposing was not a
3 contract but rather a tariff? Was there ever a time
4 when they tried to make that clear to you?

5 A No.

6 MR. WINGFIELD: No further questions.

7 | Thank you.

8 MR. CHAPMAN: I've just got a couple of
9 follow-up questions.

10

EXAMINATION

12 BY MR. CHAPMAN:

13 Q Mr. McFarland asked you a number of
14 questions related to the governance of the Belt Line
15 and what committees existed and that sort of thing, and
16 there's been a lot of conversation or questions about a
17 rate committee.

18 Is the rate committee a standing
19 committee of the Belt Line?

20 A No.

Q And under what circumstances would it
exist or be called for? How would that come about?

23 A It would be at the request of the board
24 of directors.

25 Q Okay. And in response to the 2018

1 proposal from CSX for this private contract rate, did
2 the board -- did anybody on the board ever move in
3 response to management's recommendation that a rate
4 committee be established to evaluate the Belt Line's
5 tariff?

6 A No.

7 Q Did the Belt Line ever reject the
8 proposal made for a private contract by CSX?

9 A No.

10 Q You were asked a number of questions by
11 Mr. McFarland related to the arrangements under which
12 the Belt Line leases locomotives from Norfolk Southern.

13 And I think your testimony was that that
14 arrangement has been in place since sometime in the
15 late 1980s by agreement of the owning railroads; is
16 that right?

17 A Correct.

18 Q As far as the Belt Line is concerned, is
19 it using its own locomotive power when utilizing those
20 locomotives that it leases from Norfolk Southern?

21 A Yes.

22 Q Has Norfolk Southern ever painted those
23 locomotives to have Norfolk & Portsmouth Belt Line
24 identification or markings on them?

25 A Yes.

1 that is, they have an interest in one of those three
2 companies?

3 A Correct.

4 Q By virtue of employment or otherwise?

5 A Correct.

6 Q I think you were asked some questions
7 about the relative ownership of the stock of the
8 Belt Line, and I think you described it that
9 Norfolk Southern owns 57 percent and is the, I'll call
10 it, the majority stockholder of the company; is that
11 right?

12 A Correct.

13 Q By virtue of its majority interest, from
14 your perspective as a director and an officer of the
15 Belt Line, does that mean that Norfolk Southern has the
16 ability to control the Norfolk & Portsmouth Belt Line?

17 A They have -- yes, they have more votes on
18 the board.

19 Q Norfolk Southern does?

20 A Norfolk Southern does, yes.

21 Q The traffic that was moved from CSXT to
22 NIT in 2015 occurred over a period of a couple of
23 months; is that right?

24 A Yes.

25 Q And was the Norfolk & Portsmouth

1 Belt Line able to deliver all of the traffic that CSXT
2 wanted delivered to NIT during that period?

3 A Yes.

4 Q And was the Norfolk & Portsmouth
5 Belt Line able to handle all of the traffic that came
6 out of NIT that CSXT wanted handled during that period?

7 A Yes.

8 Q You were asked some questions related to
9 the sale by the Belt Line of the property located at
10 Sewells Point, the Sewells Point area of Norfolk which
11 is up in the vicinity of Norfolk International
12 Terminals in the City of Norfolk, and I want to make
13 sure I understand.

14 Did you indicate that or testify that CSX
15 in fact objected to that sale in 2009?

16 A I would need to see the meeting minutes.
17 I wasn't -- I wasn't on the -- at the company at the
18 time.

19 Q I do not have an extra copy of these with
20 me, but I do have a set of the unanimous consents
21 signed by each of the six directors of the company in
22 2008 regarding the sale of that property for the
23 purchase price of \$5.1 million to the Virginia Port
24 Authority. And I realize you've had to look at a lot
25 of documents related to getting ready for this